well) that the 5th defendant was negligent in leaving the bus without any adequate signal or warning signs to users of the road and this has not been affirmatively disproved and here again I would need to hear evidence adduced by the said defendants before a decision can be arrived at.

The no case submission must necessarily fail.

Procedural matters following from rejection of no case submission

It is clear from the nature of the evidence which I have discussed that whether the 5th and 6th defendants were wholly or partly negligent in the case can only be decided after I have heard all the evidence in the case and that would mean considering also the evidence adduced by the other defendants in this case. Clearly therefore, entering judgment for the plaintiffs against the 5th and 6th defendants at this stage cannot arise.

Since the 5th and 6th defendants have elected not to call evidence, they are bound by the election. The Court will have to hear the evidence of the other defendants and their witnesses and the full addresses before determining whether the plaintiffs have made out a case against any of the defendants. As pointed by Toohey J. in *James* at p. 40 it is implicit in this view that the defendants who elected not to call evidence must be permitted to make a final address and they "can hardly be precluded from doing so since all they have sought to do is to argue that they had no case to answer."

Are the 5th and 6th defendants precluded from cross-examining the other defendants (should they decide to give evidence) and their witnesses? Again with respect, I agree with the view of Toohey J. that as a general proposition the cross-examination would not constitute the calling of evidence though it is conceivable that an issue may arise as to whether an answer to a particular question or the production of a document to a witness may constitute adducing evidence but such matters can be dealt with, if necessary, if they do arise during the course of the trial.

Considering the foregoing I reject the no case submission made on behalf of the 5th and 6th defendants.

NOOR FAMIZA BTE ZABRI & ANOR.

v.

AWANG BIN MUDA & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL SUIT NO. 21-2-92 (89)]
31 DECEMBER 1993

TORT: Road accident - Vehicles travelling in opposite direction - Defendant failed to press brakes and lost control of military truck - Onus of proving negligence against defendant - Whether any contributory negligence on the part of deceased-driver - Doctrine of res ipsa loquitur - Whether doctrine applies when cause of accident is known - Effect of doctrine - Whether rule of evidence or principle of substantive law.

SPECIAL DAMAGES: Onus on plaintiff to prove special damages - Whether expenses for funeral services, damage to clothings and transportation proved.

This was a claim by the widow of the deceased-driver of motor car No. JAL 1154 for damages under the Civil Law Act 1956 for loss of support, bereavement and special damages consequent to the death of her husband in the accident which occurred on 3 May 1989 at the $41^{1}/_{2}$ milestone, Jalan Ipoh Lenggong, Kati, Kuala Kangsar. The widow has also claimed damages for her injuries sustained by her and her son while both were travelling as passengers in the motor car driver by the deceased-husband. The 1st defendant was the driver of the military truck No. ZA 4859.

Held:

[1] The sketch plan drawn by the investigating officer serves a useful purpose, as from it certain inferences can be drawn to formulate the plaintiffs' case of negligence against the first defendant. The glass fragments located on the plaintiffs' correct side of the road would undoubtedly show that the first defendant had encroached into the path of the deceased. On the facts, the negligence of the 1st defendant was established.

[2] The question of contributory negligence does not arise as the first defendant has no right to complain when it was he who had placed the deceased in the situation thereby depriving the deceased of the opportunity to take reasonable steps to prevent the collision. The first defendant was found wholly liable.

[3] The plaintiffs' claim for expenses incurred for funeral services, damage to clothings and the transportation charges were not granted as the plaintiffs have failed to prove them strictly.

[First defendant found wholly liable for the accident. Plaintiffs awarded general and special damages with interest and costs].

Cases referred to:
Marshall v. Owners of S.S. Wild Rose [1910] AC 486, 487 ***(refd)***
Ng Chui Sia v. Maimon bt. Ali [1983] 1 MLJ 110 ***(refd)***
Koay Teik Choo & Ors. v. R [1956] MLJ 52 ***(refd)***
Lai Kuit Seong v. Public Prosecutor [1969] 1 MLJ 182 ***(refd)***
Barkway v. South Wales Transport Co. Ltd. [1950] 1 All ER 392 ***(refd)***
Blay v. Pollard and Morris [1930] 1 KB 628 ***(cit)***
Admiralty Comrs v. SS Susquehanna [1926] AC 655 ***(refd)***
Jefford v. Gee [1970] 1 All ER 1202 ***(refd)***
Pickett v. British Rail Engineering Ltd. [1979] 1 All ER 774 ***(refd)***
Harris v. Empress Motors Ltd. [1984] 1 WLR 212 ***(cit)***
Chua Leh Choo & Anor. v. Mohd Noor bin Ibrahim & Ors. [1988] 2 MLJ xxxi ***(refd)***
Eiap Teng Siyum v. Mohd Noor bin Ibrahim & Anor. [1988] 2 MLJ xxx ***(refd)***
Abdullah Ahmad v. Cheng Meng Chee [1988] 1 MLJ xxxvii ***(refd)***
Lam Len Chen (w) v. Sim Hee Tien [1985] 2 MLJ cxcii ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7(3)(iv)(c), (d), (3A), (3B)(a)

For the plaintiffs - R. Mahendran; M/s. Samsuni, Lim & Partners
For the defendants - Rosli Kamaruddin, FC

JUDGMENT

Haji Abdul Malik Bin Haji Ishak JC:
At about 10.30 p.m. on the 3 May 1989 there was an accident at the 41 $^{1}/_{2}$ milestone, Jalan Ipoh Lenggong, Kati, Kuala Kangsar road involving motorcar JAL 1154 and military truck ZA 4859. As a result of the accident, the driver of the motorcar sustained injuries and died of a fractured skull. Two other passengers in the motorcar survived, both sustained injuries. The driver of the motorcar was Saharudin bin Omar and the two passengers were his wife and son known as Noor Famiza bte Zabri and Bazrul Ozair bin Saharudin respectively. The military truck was driven by the first defendant as servant or agent of the second defendant. There was a passenger in the military truck who sat in front by the name of Saad bin Yahya.

According to the first plaintiff, she was accompanying her late husband together with her four (4) year old son in the motorcar, on that fateful night, to Kuala Kangsar from her house at Kubang Halban to witness the "pelita panjut". They started at 8.30 p.m. and on their way they stopped at the first plaintiff's mother's house at Lubok Merbau. At about 10.00 p.m. they decided to return home and it was on their way home that the accident occurred. The first plaintiff stated that while they were on their way home, they changed their mind and decided to go to the first plaintiff's grandfather's house at Kampong Kati. But upon arrival at the vicinity of the first plaintiff's grandfather's house, they discovered that the house was dark and so they decided to proceed home. The motorcar, at the material time, was facing the direction of Lenggong and travelling slowly on its correct side of the road, more to the left edge at a point marked in red ball pen as "X" by the first plaintiff. She then saw a vehicle coming from the opposite direction, encroached and collided into the motorcar driven by her late husband. She categorically stated that at the time of collision, the motorcar did not cross the broken centre white line.

Sergeant 55442 Ishak bin Ibrahim (SP2), the investigating officer, testified for the plaintiffs. He stated that he arrived at the scene at 10.45 p.m. on the night in question. Having ascertained that the driver of the motorcar had been sent to the hospital and that there were no traffic jams at the scene, he then proceeded to draw a rough sketch plan (agreed bundle marked "C" at pages 1 & 2). He elaborated on the rough sketch plan and stated that glass fragments were found at point "L". There were scratch marks on the road at point "W" and the military truck ploughed through banana, durian and rambutan trees and stopped dead in its track to the right side of the road as one faces Kuala Kangsar leaving tyre marks therein. The military truck also demolished a telecommunication's iron post leaving a short stump as a grim reminder of an ugly episode. SP2 also testified that the front right door of the motorcar was dented, torned off and landed at "M". That stretch of road where the accident took place was straight and there were no obstacles or potholes on the road. The road was well-tarred. This witness (an I.O. of three months' standing) rounded up his evidence by stating that he thought that the accident took place at points "L" and "W" in the sketch plan.

The first defendant, in his evidence, stated that he was driving the military truck ladened with items from the store proceeding from kampong Kenayang Grik to Lasah Camp at Seremban. Seated next to him was Saad bin Yahya (SD2). The 9 ton military truck was travelling at 50 kilometres per hour in a convoy. He stated that before the accident he first saw a motorcar with its low lights at a distance of 200 metres and reacted by reducing his speed. He corrected the movement of his military truck and proceeded ahead not realising that an accident would occur. He stated that the military truck came into contact with the motorcar in a glancing blow (tergesel). There was a loud noise. He panicked and failed to press his brakes thereby causing the military truck to swerve to the right. In short, he lost control of the military truck and rammed into a telecommunication's iron post and fruit trees. He stated that the road was straight as indicated in the sketch plan with no potholes at all.

Saad bin Yahya, DW2, in his evidence, said almost the same thing in his description of how the accident took place. He stated that before the accident, he saw the motorcar about 20 metres from the military truck in the opposite direction. There were no signs to indicate that an accident would occur. The motorcar had its headlights on. He felt that the military truck was travelling at 50 kilometres per hour. According to DW2, after he heard a loud noise then he realised that an accident had happened. He admitted conversing with the driver. Though he admitted that the conversation would affect the driver's concentration while driving yet he was adamant in saying that the conversation would prevent the driver from feeling lethargic as they had just broke their fast.

It is now trite law that the onus of proving negligence on the part of the defendant is on the plaintiff. In *Marshall v. Owners of S.S. Wild Rose* [1910] AC 486, 487, Lord Loreburn LC had this to say:

> Now in the affairs of life, where much is often obscure, men have to draw inferences of fact from slender premises. A plaintiff or claimant must prove his case. The burden is upon him. But this does not mean that he must demonstrate his case. It only means that if there is no evidence in his favour upon which a reasonable man can act he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude that in fact this man fell into the water by accident, and so was drowned, then the case is proved.

Nearer home is the case of *Ng Chui Sia v. Maimon bt. Ali* [1983] 1 MLJ 110 where Hashim Yeap Sani J. (as he then was) said:

> In an action for negligence the onus of proving the allegation of negligence rests on the person who makes it unless there are disclosed facts which raise a presumption in favour of the plaintiff. The plaintiff must show affirmatively that there has been a breach of a specific or general duty by the defendant and this resulted in the damage to the plaintiff. If he fails to prove this the action must fail.

It is also pertinent to point out that the Trial Court should not approach a case on the basis of deciding which of the two conflicting versions which should be believed but rather on the basis of considering which version is inherently probable or improbable *(Koay Teik Choo & Ors. v. R.* [1956] MLJ 52). With these principles in mind, I shall now assess the evidence in the present case.

In the statement of claim, it was alleged that the deceased was lawfully driving his motorcar on his own proper side of the road when the military truck driven along its wrong side collided into him. The defence was that, as set out in the statement of defence, that there was a collision between the two vehicles and that the deceased contributed to the accident.

The first and crucial question to ask was whether or not the deceased had in truth driven his motorcar on his correct side of the road and, as alleged by the defence, that the deceased had contributed to his own misfortune.

As proof of the first defendant's negligence, Counsel for the plaintiffs relied on the doctrine of *res ipsa loquitur*, and the said doctrine was so pleaded in the statement of claim. I am sceptical and I do not think that, on the pleadings and the evidence adduced on both sides, the doctrine has any application in this case. *Lai Kuit Seong v. Public Prosecutor* [1969] 1 MLJ 182 explained the doctrine in this way:

> the doctrine does not apply where the cause of the accident is known... the res speaks because, and only because, where the accident stands unexplained, the known facts and circumstances, however meagre, may be such that want of reasonable care is safely attributable to the person but for whose negligence the accident could not have happened... conversely, *res ipsa loquitur* cannot be relied on where the *res* is ambivalent.

It has to be borne in mind that the doctrine is not a principle of substantive law but a rule of evidence. In *Barkway v. South Wales Transport Co. Ltd.* [1950] 1 All ER 392 and 399. Lord Normand had this to say:

> ... the maxim is no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant.

In another part of the judgment, Lord Normand had this to say:

> It can rarely happen when a road accident occurs that there is no other evidence, and, if the cause of the accident is proved, the maxim *res ipsa loquitur* is of little moment. The question then comes to be whether the owner has performed the duty of care incumbent on him, or whether he is by reason of his negligence responsible for the injury.

In *Barkway's* case (*supra*) the House of Lords held that as the cause of the accident was known *res ipsa loquitur* did not apply, but that on the facts the negligence of the defendants was established. In my judgment that is exactly the position in the present case.

Noor Famiza recounted the events prior to the accident rather vividly. She was categorical in stating that her late husband drove the motorcar slowly, more to the left side of the road as one faces Lenggong. She proceeded, without hesitation, to mark with a red ball pen on the rough sketch plan point "X" indicative of the location of the motorcar. This factor must be weighed in the light of her evidence that the car slowed down as they were nearing her grandfather's house. She could see that her grandfather's house was dark and this fact would correlate with her version that her late husband drove the motorcar slowly. Had her late husband was speeding, at that point of time, she could not have made out nor ascertained that her grandfather's house was dark.

The sketch plan drawn by the investigating officer serves a useful purpose, for from it certain inferences can be drawn to formulate the plaintiffs' case of negligence against the first defendant. Now, the glass fragments located on the plaintiffs' correct side of the road would undoubtedly show that the first defendant had encroached into the path of the deceased. The first defendant must have sped as the damages to the motorcar was extensive and the tyre marks of the military truck measured 51.80 metres. Even the right hand door of the motorcar came off and landed some distance away from the motorcar. The photograph of the motorcar (see supplementary agreed bundle of documents at "C1"), taken by the Government chemist showing the front and offside view of the motorcar, shows the extent of the damage as a result of the accident. In his brief report, the government chemist concluded that:

> .... the motor truck and motorcar did come into collision with one another.

But the defendants sought to establish, departing as they did from their pleadings, that both vehicles merely came into contact with one another in a glancing blow (tergesel). A glancing blow as alleged by the first defendant would run counter to, firstly, the extensive damages incurred by the motorcar and the consequential death of the deceased, secondly, the opinion of the Government chemist that both vehicles collided with one another and not glanced with one another. It seems, from the tenor of the first defendant's evidence, he was trying to reconcile his evidence with his police report which stated that both vehicles "seliseh" only. But he forgot, in so doing, that the statement of defence averred that there was a collision. It is now trite law that the purpose of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate. In short, a party is bound by his pleadings and his case is confined to the issues raised in the pleadings unless and until they are amended (*Blay v. Pollard and Morris* [1930] 1 KB 628 at 634).

The accident happened during the fasting month. The first defendant was driving continuously (except for a short break in order to break his fast) for approximately 6 hours. During the early part of the journey, the first defendant and the rest of the convoy had to go through muddy terrain and the first defendant's military truck got stucked in the mud. It is reasonable to infer that the first defendant must be tired that night. Even his fellow passenger, Saad bin Yahya (SD2) agreed that he spoke to the first defendant to prevent lethargy. In that atmosphere, the first defendant saw some 200 metres away the lights of the motorcar from the opposite

direction. He said he quickly reduced his speed and controlled his military truck. Now, if the first defendant did what he said he did, the two vehicles would not have collided with one another. The motorcar was on its correct side of the road at the material time. To enable the collision to occur would simply mean that there was encroachment by the first defendant into the path of the motorcar. That must have been and the only probable conclusion that can be deduced from the available evidence. It follows therefore that negligence should be placed entirely on the first defendant.

It has been submitted that Saad bin Yahya (SD2) gave almost exactly the same evidence as the first defendant. But I venture to say boldly that passengers are not expected to be paying close attention to the driving of a vehicle. In an emergency, passengers are not expected to say with certainty, the position which the moving vehicle was occupying at a given moment of time. This observation equally applies to Saad bin Yahya. For example, Saad bin Yahya saw the motorcar about 20 metres from the opposite direction and then he heard a loud noise. He could not say positively, one way or the other, as to how the accident occurred. In the face of the report of the Government chemist, Saad bin Yahya could not have said more than that.

The first defendant, an inexperienced driver of 4 month's standing, knew that he was driving a 9 ton military truck, a heavy vehicle. Yet when the collision occurred, he panicked and failed to control nor brake the military truck. Under such circumstances, the question of contributory negligence does not arise as the first defendant has no right to complain when it was he who placed the deceased in that situation depriving the deceased of the opportunity to take reasonable steps to prevent the collision. I therefore hold the first defendant wholly liable.

Special Damages

It is now trite law that the onus is on the plaintiff to prove special damages strictly. In *Admiralty Comrs v. SS Susquehanna* [1926] AC 655, Viscount Dunedin lucidly stated that:

> If there be any special damage which is attributable to the wrongful act, that special damage must be averred and proved and, if proved, will be awarded.

The plaintiffs sought for expenses incurred for funeral services, damage to clothings and the transportation charges but these items were not granted as the plaintiffs failed to prove them strictly. However, as agreed between both parties, RM134 was granted for the purchase of police and medical reports.

On the question of interest on special damages, my attention was drawn to *Jefford v. Gee* [1970] 1 All ER 1202 to the effect that special damages may be fairly averaged out at half the usual rate of interest from the date of accident to the date of judgment. Now, applying the conventional rate of interest permitted by our Courts, i.e. 8% per annum, therefore, the correct rate payable on special damages, in the present case, must be at 4% per annum from date of accident until date of judgment and only thereafter would the plaintiffs be entitled to 8% per annum until realization.

Bereavement

I would allow the claim for damages for bereavement under s. 7(3A) read with s. 7(3B)(a) of the Civil Law Act 1956 for the spouse of the deceased at RM10,000.

General Damages

Under general damages, I took into account that the deceased was a school teacher earning a monthiy salary of RM1,065 plus an allowance (elaun khidmat awam) of RM45 per month. This would come to RM1,110 per month. Now, under s. 7(3)(iv)(c) of the Civil Law Act 1956 in assessing the **loss of earnings**, the Court shall take into account any diminution of any such amount as is proved to be the living expenses of the deceased at the time of his death. In the course of assessing the damages under this head, the speech of Lord Salmon in *Pickett v. British Rail Engineering Ltd.* [1979] 1 All ER 774 immediately comes to mind. Lord Salmon had this to say, and I quote:

> ...the assessment of living expenses may no doubt sometimes present difficulties but certainly no difficulties, which would be insuperable for the Courts to resolve.

From the available evidence, and bearing in mind that the ingredients that go to make up living expenses are the same and would apply equally whether the victim be young or old, single or married, with or without dependants, I took into account the relevant evidence that the deceased purchased two or three shirts a year at RM90 per year (RM30 x 3 shirts).

Monthly, the deceased would therefore utilise RM7.50 (rounded up at RM10 per month). Thus, the figure would be RM1,110 - RM10 = RM1,100 per month. This method of calculation is perfectly legitimate. It is now established that the sum to be deducted as living expenses is based on the proportion of the victim's net earnings which he spends to maintain himself at the standard of life appropriate to his case and any sums expended to maintain others do not form part of the victim's living expenses and should not, consequently, be deducted from the net earnings (see *Harris v. Empress Motors Ltd.* [1984] 1 WLR 212 especially at p. 228). The multiplier to be adopted would be dependant on s. 7(3)(iv)(d) of the Civil Law Act 1956 i.e. "... in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2." The deceased was 35 years of age at the time of his death. thus, 55-35 = 20 - 2 = 10 years. By simple arithmetic, using 10 as a multiplier, the result would be (RM1,110 x 12 months) x 10 years = RM132,000 for **loss of earnings**.

The first plaintiff sustained the following injuries:

(a) cerebral concussion. I would award RM1,500 for this injury on the authorities of *Chua Leh Choo & Anor. v. Mohd. Noor bin Ibrahim & Ors.* [1988] 2 MLJ xxxi and *Eiap Teng Siyum v. Mohd. Noor bin Ibrahim & Anor.* [1988] 2 MLJ xxx.

(b) abrasion 2 cm right cheek. For this injury, I would award RM500 taking into account inflationary rate and by comparing with *Abdullah Ahmad v. Cheng Meng Chee* [1988]1 MLJ xxxvii where a sum of RM300 was awarded for abrasion of right temple.

(c) soft tissue injury. A sum of RM300 would be awarded.

I would award the second plaintiff, a young boy of 4 years of age, RM500 for pain over his right cheek on the authority of *Lam Len Chen (w) v. Sim Hee Tien* [1985] 2 MLJ cxcii where a sum of S$500 was awarded for concussion, abrasion of the face and haematoma.

Finally, I award interest for general damages at the rate of 6% per annum from date of filing of the suit to date of judgment.

Order accordingly.

PUBLIC PROSECUTOR

v.

CHUAH KOK WAH

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN HAJI MOHD YUNUS JC
[CRIMINAL TRIAL NO. 47-3-90]
6 DECEMBER 1993

EVIDENCE: Whether chemist an expert witness - Whether relevant tests on drugs conducted - Evidence of Chemist - Marking on Exhibits by Police - Chain of Evidence - Whether failure to carry out fingerprint tests on exhibits invoked s. 114(g) Evidence Act 1950 - Whether finger print tests required.

DANGEROUS DRUGS: Custody and control - Whether presumptions under s. 37(d) Dangerous Drugs Act 1952 operates - Whether knowledge of existence of drug needs to be proved before presumptions under s. 37(d) DDA 1952 can be invoked - Whether prima facie case established.

EVIDENCE: Weight of exculpatory cautioned statements - "Prima facie" case - Qualification of expert witness - Dangerous Drugs Act 1952.

The accused was charged with trafficking in 864.27 gms. heroin under s. 39B(1)(a) DDA 1952. The accused was arrested at a jetty at Pulau Ketam by the police where in a body search a plastic packet was found in the accused's underwear and two other similar packets, each taped to the left and right thigh of the accused. The packets were seized and were found to contain whitish substance which were later analysed by the Government chemist (SP1) and found to contain 864.27 gms. of heroin.

At the close of the prosecution's case the defence submitted that the prosecution failed to make out a *prima facie* case. It was the contention of the defence that there was no evidence (SP1) was an expert witness or that he was qualified in analysis of heroin.

The defence Counsel challenged that even if SP1 was an expert there was no evidence he had analysed the substance in question or carried out necessary tests. It was also submitted that as the prosecution had failed to carry out a fingerprint test on the vital exhibits, the Court should invoke s. 114(g) of the Evidence Act 1950. The defence Counsel further contended that in order to prove custody and control and to rely on the presumptions under s. 37(d) of the DDA